No. 87-695

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

DOROTHY LOUISE TURNER, EXECUTRIX
OF THE ESTATE OF O. L. TURNER,
Petitioner,

vs.

CITY OF ATLANTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:

Bryant v. Zimmerman, 278 U.S. 63 (1928) 2
Chicago, B.&Q.R.R. v. Chicago, 166 U.S. 226 (1897) 3
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378 (1987) 3, 4
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Street v. State of New York, 394 U.S. 576 (1969) 2
Webb v. Webb, 451 U.S. 493 (1981) 2

Other Authorities:

U.S. Constitution, Fifth Amendment 1, 2
U.S. Constitution, Fourteenth Amendment 1

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ARGUMENT

1. The "Takings" Issue

A. This Court Clearly Has Jurisdiction

Respondent argues that this Court lacks jurisdiction to consider the "takings" issue because Petitioner did not reference the Fifth Amendment of the United States Constitution in the proceedings below. Respondent has failed to cite any authority supporting its unfounded contention that Petitioner must specifically raise the Fifth Amendment *in addition to* the Fourteenth Amendment when bringing a "takings" claim against a municipality.

In *Webb v. Webb*, 451 U.S. 493 (1981), which Respondent cites for the general proposition that a federal claim must be adequately presented, this Court also held that

> Although it would avoid uncertainty and expenditure of much time and effort if litigants identified in state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity.

Webb, 451 U.S. at 399.

In paragraph 12 of the Complaint, Petitioner alleged that the zoning classification was "arbitrary, unreasonable and confiscatory . . . unconstitutional and in violation of Article I, Section 1, Paragraph 1 of the Georgia Constitution, Article I, Section 3, Paragraph 1 of the Georgia Constitution, and the due process clause of the Fourteenth Amendment of the Constitution of the United States." (Appendix D, pp. A20-A21). Petitioner properly raised a federal constitutional "takings" claim by challenging the confiscatory nature of the City of Atlanta's actions in violation of the Fourteenth Amendment of the United States Constitution.[1] Furthermore, the "takings" clause of the Fifth Amendment applies only to the federal gov-

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1. In *Street v. State of New York*, 394 U.S. 576 (1969), this Court held that "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this court is not bound by the decision of the state courts." *Id.* at 583. This Court also held that "[t]here are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential. . . . And if the record as a whole shows . . . by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Id.* at 584; *See also Bryant v. Zimmerman*, 278 U.S. 63 (1928).

ernment, whereas the "takings" clause is applicable to the states through the Fourteenth Amendment. *See, Chicago, B.&Q.R.R. v. Chicago,* 166 U.S. 226, 235-41 (1897).

Notwithstanding the fact that the Georgia Constitution has its own "takings" clause, the blistering dissent of Justice Smith below leaves no doubt that the Georgia Supreme Court considered Petitioner's federal constitutional claim. Justice Smith cited *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S.Ct. 2378 (1987), and *Nollan v. California Coastal Commission,* 107 S.Ct. 3141 (1987), for the proposition that "if the government takes property, whether in form of a physical taking or a regulatory taking, by zoning or otherwise, be it temporary or permanent, partial or whole, the government must compensate the citizen for the taking." (Appendix A, p. A3).

2. The Notice Issue

The City of Atlanta does not deny that it did not attempt to provide individual notice[2] to Petitioner that the improved commercial property would be downzoned by the 1982 Atlanta Zoning Ordinance. Furthermore, Respondent does not deny that the alleged notice by publication never identified Petitioner's property. This was constitutionally insufficient. *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983).

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2. Respondent contends, however, that Petitioner failed to prove at the trial that O. L. Turner did not receive actual notice of the enactment of the 1982 Atlanta Zoning Ordinance. This is simply not true. (T. 49).

CONCLUSION

As acknowledged by Respondent, recent decisions by this Court have illuminated new issues, questions, uncertainty and speculation over municipal zoning powers. This case provides an ideal opportunity to further develop the substantive law in this area and to remove existing confusion emanating from the *Nollan* and *First English Church* decisions. Furthermore, the very important notice issue in this case has not been previously addressed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served the necessary copies of this reply brief upon

Robert L. Zoeckler
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by causing the printer to place said copies in the United States mail, postage prepaid.

I further certify that all parties required to be served have been served.

This 1st day of March, 1988.

JAMES D. MEADOWS